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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~654~~ 76

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants;

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

JURISDICTIONAL STATEMENT

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v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

JURISDICTIONAL STATEMENT

Appellants, the Railway Labor Executives' Association, the Brotherhood of Railway Trainmen, and the Order of Railway Conductors and Brakemen appeal from the judgment of the United States District Court for the Eastern District of Missouri, Eastern Division, entered on August 12, 1956, insofar as said judgment enjoins the United States of America and the Interstate Commerce Commission from enforcing the second ordering paragraph of the Commission's order of December 7, 1953, entered in a proceeding bearing the principal caption MC 89913, Sub. No. 1, *Frisco Trans-*

portation Company Extension—Joplin—Miami, and sets aside, suspends, and annuls said paragraph of that agency order. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court is reported at 153 F. Supp. 572, and is attached hereto as Appendix B. The judgment, findings of fact, and conclusions of law of said Court are attached hereto as Appendix C. The opinion of the Interstate Commerce Commission is reported at 62 M.C.C. 367. The orders of the Commission are unreported. The Commission's opinion and orders are attached as Appendix D.

JURISDICTION

The Complaint was filed in the District Court on May 20, 1955, by Frisco Transportation Company under the Fifth Amendment of the Constitution of the United States, Sections 7, 8, and 10 of the Administrative Procedure Act [5 U.S.C. 1006, 1007, and 1009], Sections 1336, 1398, 2284, and 2321-2325 of the Judicial Code [28 U.S.C. 1336, 1398, 2284, and 2321-2325], and the Interstate Commerce Act [49 U.S.C. 1, et seq.], and asked the Court to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding in Commission Docket No. MC 89913, Sub. No. 1, identified as *Frisco Transportation Company Extension—Joplin—Miami.* The United States was made the defendant pursuant to Section 2322 of the Judicial Code [28 U.S.C. 2322]. Appellants filed a motion to intervene

as parties defendant in said action pursuant to Sections 17(11) and 205(g) of the Interstate Commerce Act [49 U.S.C. 17(11) and 305(g)], Section 2323 of the Judicial Code [28 U.S.C. 2323], and Rule 24 of the Federal Rules of Civil Procedure, which was granted by the District Court on March 15, 1956. Thereafter, appellants filed an answer to the Complaint.

The judgment of the District Court was entered on August 12, 1957, and notice of appeal was filed in that Court on October 8, 1957. The jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code [28 U.S.C. 1253 and 2101(b)]. Such jurisdiction is sustained by the decisions in *United States* v. *Texas & Pacific Motor Transit Co.*, 340 U.S. 450 (1951); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Does the Interstate Commerce Commission have authority, after notice and hearing, to impose conditions on motor carrier certificates of a wholly-owned subsidiary of a railroad for the purpose of insuring that the operations of the subsidiary are auxiliary to or supplemental of the parent railroad's train service under circumstances where:

(a) the operating rights represented by said certificates were acquired by the purchase of independent motor carriers subject to the approval of the Interstate Commerce Commission under Section 213 [now Section 5(2)] of the Interstate Commerce Act, which permits agency approval of such a purchase only upon a finding that the parent railroad can use the motor

carrier service to public advantage in its own operations;

(b) the Commission based its findings in the acquisition proceedings under said section that the requirements of the statute were met on the ground that applicant Frisco Transportation Company proposed to use the purchased operating authority to provide a coordinated rail-truck service;

(c) the Commission included in its reports approving the purchases the provision that the authority granted was subject to such further limitations or restrictions as the agency might thereafter find necessary to impose to insure that the motor service involved be auxiliary to or supplemental of the train service of the parent railroad; and

(d) the reservation of authority made in the reports approving the purchases was not inserted in the certificates issued pursuant thereto.

2. If Question 1 is answered in the negative, the further question is presented as to whether the Commission has authority under the circumstances enumerated in paragraph 1 above to impose conditions upon the certificates of a motor carrier subsidiary of a railroad in order to insure that operations thereunder be auxiliary to or supplemental of the parent railroad's train service upon finding, after notice and hearing, that the reservation of authority to subject the certificates to further limitations or restrictions contained in its reports approving the purchases of the routes covered by the certificates was *inadvertently* omitted from the certificates themselves.

3. If Question 2 is answered affirmatively, a further question is presented as to whether there was adequate

evidence to support the Commission's finding that the reservation of authority to impose further limitations or restrictions upon the motor carrier certificates involved in order to insure that operations thereunder be auxiliary to or supplemental of the parent railroad's train service was omitted from the certificates through error.

STATUTES INVOLVED

This appeal primarily involves the National Transportation Policy [49 U.S.C., preceding Sec. 1], and Section 5(2)(b), Section 212(a), and former Section 213(a)(1) of the Interstate Commerce Act [49 U.S.C. 5(2)(b) and 312(a)(1)]. These statutory provisions are set forth in full in Appendix A hereto.

STATEMENT

The order of the Interstate Commerce Commission which was the subject of the Complaint in the District Court amended certificates of the Frisco Transportation Company hereinafter called "the Transportation Company"), a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company (hereinafter called "the Railroad"), covering five segments of Transportation Company's routes so as to impose the following limitations upon operations over those segments (Appendix D, 56a and 57a):

> 1. The service to be performed by the Frisco Transportation Company, hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, except that this condition shall not apply with respect to Dyess, Arkansas.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amory-Tupelo (considered as one), Miss.

4. All contractual arrangements between the Transportation Company and the railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

The segments involved were purchased by Transportation Company from prior operators and have been described throughout the litigation by the vendor's name. The segments are (1) the "Cooper" route between Joplin and Carthage, Missouri; (2) the "Hamm" route between Miami, Oklahoma, and Joplin, Missouri; (3) the "Tolson" route between Walnut Ridge, Arkansas, and Memphis, Tennessee; (4) the "Parker" route between Blytheville, Arkansas, and Memphis, Tennessee; and (5) the "Bennett" route between Blytheville and Lake City, Arkansas.

Transportation Company filed separate applications with the Commission for approval of each purchase pursuant to Section 213 of the Interstate Commerce Act [49 U.S.C. 313]. Paragraph (a)(1) of this section read as follows:[1]

> "Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205(f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however, That if a carrier as defined in section 1(3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.*" (Italics supplied)

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[1] Section 213(a)(1) was repealed by the Transportation Act of 1940, Section 21(e) [54 Stat. 924], and the substance carried forward into Section 5(2)(b).

Transportation Company was and is the wholly-owned subsidiary of the Frisco Railroad, a carrier within the meaning of Section 1(3) of Part I of the Interstate Commerce Act [49 U.S.C. 1(3)]. (App. B, 6a) Consequently, the Commission could legally approve Transportation Company's purchase of the five segments involved only if the transactions met the test of the above quoted proviso in Section 213(a)(1). The Commission has long interpreted this proviso to limit acquisition of motor operations by railroads or railroad subsidiaries to those which are auxiliary to or supplemental of the railroad's train service. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 437 (1951); *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 5 M.C.C. 9, 11, 12 (1937). In acting upon Transportation Company's applications for approval of the proposed acquisitions, the Commission gave full effect to such restrictions on its authority.

In *Frisco Transportation Company—Purchase—Cooper*, 15 M.C.C. 317 (1938), the Commission (Div. 5) considered Transportation Company's application for approval to acquire the "Cooper" route. At page 318 of its report granting such approval, the Commission made the following finding:

> "The authority herein sought is desired to afford applicant and the railway means for developing coordinated rail truck service with a view toward retrieving some of the substantial volume of less-than-carload freight directed from the railway to competing highway carriers and to improve the railway's service to the public."

On the basis of this factual finding, the agency concluded that the purchase would enable the Railroad to use the motor service involved to public advantage in

its own operations (page 319). At the same time the Commission recognized that experience might give rise to the necessity for the future imposition of specific conditions to achieve the required statutory limitations upon Transportation Company's purchased authority. The agency therefore imposed the following condition upon its approval (page 319):

> "Provided that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary to or supplemental to the train service of said railway company."

The application of Transportation Company to acquire the "Hamm" route came before the Commission in *Frisco Transportation Company — Purchase — Hamm,* 15 M.C.C. 320 (1938). The Commission (Div. 5) made the identical findings as to Transportation Company's intent to operate a coordinated rail-truck service as it made in connection with the "Cooper" purchase, and on such basis concluded that the purchase of the "Hamm" route would meet the requirements of Section 213(a)(1)—(page 321). The Commission also conditioned its approval upon the same reservation of authority to impose future specific conditions upon the operation as the agency provided in the "Cooper" purchase (page 322.).

Transportation Company's application for approval of its purchase of the "Parker" and the "Tolson" routes came before the Commission (Div. 5) in *Frisco Transportation Company — Purchase — Joseph W. Parker,* 25 M.C.C. 96 (1939). At page 99 of its report approving the purchase, the Commission made the following finding as to the type of service which Trans-

portation Company proposed to operate if its purchase was approved:

> "Considerable evidence was offered showing the manner in which coordinated rail-truck service would be rendered similar in character to that described in *Frisco Transp. Co.-Purchase-Hamm, supra,* and many resulting benefits to the public are of record."

On this basis the Commission concluded that the purchase would meet the reguirements of Section 213(a)(1)—(page 100). It also imposed upon its approval of the purchase the identical reservation of authority to restrict the operation in the future as was placed upon its approval of the "Cooper" and "Hamm" purchases (page 100).

The application of Transportation Company to purchase the "Bennett" route came before the Commission (Div. 5) in *Frisco Transportation Company—Purchase—Bennett,* 35 M.C.C. 802 (1940). The agency without an opinion adopted the examiner's recommendation that it be approved and that authority be reserved to impose specific future conditions to insure an auxiliary or supplemental operation.

Transportation Company took no exceptions to the findings or conditional approvals of the Commission in the above cited acquisition proceedings and consummated the transactions pursuant to such approval.

Between March and July, 1939 "compliance orders" were issued by the Commission which set forth the authority to be embodied in the certificates to be issued to Transportation Company pursuant to the agency approval of the five purchases with the exception of the "Bennett" purchase. There was omitted from

these orders the reservation of authority contained in the Commission's reports approving the purchases to subject operations thereunder to such further limitations or restrictions as the Commission might find necessary to insure that the service be auxiliary to or supplemental of the Railroad's service. The certificates subsequently issued pursuant to these "compliance orders" also omitted this reservation of authority. (App. B, 7a) However, the certificate issued to Transportation Company covering the "Bennett" route did contain the reservation of authority (App. B, 9a).

In July, 1941, prior to issuance of the certificates, a group of nine motor carriers operating in the same area as Transportation Company filed a complaint with the Commission alleging that such carrier's operations violated the Interstate Commerce Act and agency orders. The burden of the complaint was that Transportation Company was performing a direct motor service in contravention of the conditions under which it was authorized to purchase its operating rights. (App. B, 9a) The complaint came before Division 5 of the Commission in *Campbell Sixty-Six Express, Inc., et al.* v. *Frisco Transportation Company, et al,* 43 M.C.C. 641. The Division made the following findings with respect to the operations of Transportation Company:

> 1. Transportation Company is engaged in performing an independent motor service of the same kind and character as is performed by motor carriers generally (page 647).
>
> 2. Transportation Company does not refute the claim that it is performing an independent motor service rather than a service strictly auxili-

ary to or supplementary of that of the Railroad (page 649).

3. Transportation Company's claim that its unrestricted service is beneficial is irrelevant since the issue before the Commission is whether the carrier has been authorized to perform only an auxiliary and supplemental service and whether it has performed such a service (page 649).

4. The acquisition of the Cooper, Hamm, Tolson, Parker, and Bennett routes by Transportation Company was authorized and approved in order for the carrier to perform auxiliary and supplemental service to that of the Railroad. Transportation Company was not authorized to perform direct motor carrier service and should discontinue to do so (page 653).

Division 5 stated that the acquisition proceedings would be reopened to determine what conditions should be imposed to insure that Transportation Company's operations be auxiliary to or supplemental of the Railroad's service (page 653).

Transportation Company appealed the Division 5 decision to the full Commission in *Campbell Sixty-Six Express, Inc., et al. v. Frisco Transportation Company, et al.*, 46 M.C.C. 223 (1946), which held that Transportation Company had not violated the terms of its certificates in its operations because the restrictions contained in the reports in the acquistion proceedings had been omitted from those certificates. The Commission stated, however, that its opinion did not mean that the certificates held by Transportation Company could not be corrected to reflect the intent of the findings in the acquisition proceedings or that restrictions could not now be imposed upon the Company's certificates which would have the effect of limiting service

thereunder to that which is auxiliary to or supplemental of the Railroad's train service (page 225). Nor did the Commission disagree with Division 5 as to the intent of the agency in approving the acquisitions to limit the purchased operations to those which were auxiliary to or supplemental of the Railroad's train service.

Thereafter, on January 4, 1945, Division 5 of the Commission, upon its own motion, reopened the acquisition proceedings for reconsideration to determine what, if any, conditions or restrictions should be imposed on Transportation Company's certificates with regard to the type of service which that carrier might render. A hearing was held and in *Frisco Transportation Company Extension—Joplin—Miami*, 53 M.C.C. 415 (1951), the Commission (Div. 5) rendered its decision. The principal argument made by Transportation Company against the imposition of additional conditions was the lack of power in the Commission to modify the carrier's certificates. Division 5 rejected this argument and made the following findings:

> 1. It is clear that Transportation Company's purchases of the routes in question were approved by the Commission solely to enable the carrier to perform an auxiliary and supplemental service and "the reports in each case clearly imply an intent and expectation that all motor operations not in aid of the rail service would not be undertaken." (page 423)
>
> 2. The certificates in issue may not authorize operations greater than approved in the acquisition proceedings and to the extent that they do so were inadvertently issued and may be corrected to reflect the approved operation. (page 425)

The Division directed that Transportation Company's certificates be amended to include the five conditions here in issue so as to make the carrier's operations auxiliary to or supplemental of the Railroad's train service (pages 427-435).

Transportation Company appealed this decision to the full Commission, which sustained the conclusions of Division 5. *Frisco Transportation Company—Extension—Joplin—Miami,* 62 M.C.C. 367 (1953). The Commission held that the omission of the reservation of authority from the Cooper, Hamm, Parker, and Tolson certificates did not prevent the imposition of specific conditions on the operations covered by those certificates. The agency set forth its conclusion thereon in the following language (Appendix D, 44a):

> "We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may authorize operations greater than those for the performance of which the Division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accordance with such findings issued without proceeding in accordance with the provisions of Section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved."

The agency further held that *United States* v. *Rock Island Motor Transit Co.,* 340 U.S. 419 clearly author-

ized it to impose the conditions on the "Bennett" certificate since authority to do so was reserved in the certificate. (App. D, 39a).

Thereafter, Transportation Company brought its action in the District Court to enjoin, set aside, suspend, and annul the Commission's order on the principal ground that such order constituted an invalid revocation of its certificates for the route segments involved contrary to the provisions of Section 212(a) of the Interstate Commerce Act.

On August 18, 1955, the appellants filed a motion with the District Court for leave to intervene as parties defendant in this action pursuant to the provisions of Section 17(11) and 205(g) of the Interstate Commerce Act [49 U.S.C. 17(11) and 305(g)], Section 2323 of the Judicial Code [28 U.S.C. 2323], and Rule 24 of the Federal Rules of Civil Procedure, as representatives of employees of the Railroad who had a legal interest in the Commission's order which was the subject of the Complaint. This motion set forth (1) that the Railway Labor Executives' Association was an association with which there were then affiliated nineteen standard national and international railroad organizations which had agreements with the Railroad concerning rates of pay, rules, and working conditions of the Railroad's employees represented by those organizations; (2) that the Brotherhood of Railroad Trainmen and the Order of Railroad Conductors and Brakemen were standard railway labor organizations which also had agreements with the Railroad concerning the rates of pay, rules, and working conditions of railroad employees represented by those two organizations; (3) that the employees of the Railroad were protected in their job security by the Commission's order

requiring the operations of Transportation Company to be supplemental to or auxiliary of the operations of the Railroad; (4) that if Transportation Company were successful in its suit to set aside such order, its services could then be operated as a substitute for the rail services of the parent Railroad to the detriment of the employees of that Railroad represented by the organizations seeking intervention; and (5) that the interests of the employees of the Railroad represented by the organizations seeking intervention would not be represented by any other party to the proceeding.

Transportation Company opposed this intervention. The three-judge court, convened to hear the Complaint as provided in Sections 2321-1325 of the Judicial Code [28 U.S.C. 2321-2325], conducted a hearing on the motion to intervene and thereafter issued its order of March 15, 1956, granting the motion.

A hearing on the merits of the Complaint was held by such Court on June 20, 1956. On June 28, 1957, the court issued its memorandum opinion holding that the Commission's order of December 7, 1953, was invalid except as to the restrictions imposed upon the "Bennett" route and should be set aside. District Judge Moore dissented and entered a separate opinion (App. B, 5a-18a).

The majority held on the authority of *Watson Bros. Transp. Co.* v. *United States*, 132 F. Supp. 905, aff'd 350 U.S. 927, that the action of the Commission in revising the certificates of Transportation Company covering the Cooper, Hamm, Parker, and Tolson routes by imposing specific conditions in those certificates to insure that operations thereunder be auxiliary to or supplemental of the

Railroad's train service revoked or modified such certificates in violation of the provisions of Section 212(a) of the Interstate Commerce Act (App. B, 10a-12a). The majority also held that the Commission's order covering the four route segments was issued without adequate support in the evidence for the agency's finding that it had inadvertently omitted from the certificates the reservation of authority to impose future specific conditions (App. B, 13a-15a).[2]

District Judge Moore in his dissent rejected the view that *Watson Bros. Transp. Co.* v. *United States* was controlling. The dissent stated that there was nothing in that decision to indicate that this Court had changed the views expressed in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, sustaining the power of the Commission to revise certificates issued to a railroad motor subsidiary in acquisition proceedings in order to insure that operations thereunder be supplemental to or auxiliary of the parent railroad's train service. Also, Judge Moore interpreted this Court's affirmance of the majority opinion of the District Court in the *Watson* case as based upon failure of the Commission to give notice and hearing to the carrier in that case before changing its certificate rather than upon the absence of power in the Commission to make such a change even though the certificate had been inadvertently issued. The dissent further expressed the view that the omission from the certificates covering the four route segments of the reservation of authority contained in the reports in the acquisi-

[2] The court sustained the conditions placed in the certificate for the "Bennett" route on the authority of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951).

tion proceedings was in fact a clerical error on the part of the Commission and not, as the majority found, the result of an intentional decision by the Commission to reverse the determinations made in those proceedings. (App. B, 15a-18a)

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of substantial importance in the administration of the Interstate Commerce Act and the determination of the scope of railroad-controlled motor carrier operations under that Act.

The National Transportation Policy [49 U.S.C., preceding Section 1] declares it to be the policy of Congress to provide for regulation of all modes of transportation subject to the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each, to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense.

The single most important provision of the statute for preserving the independence and inherent advantages of rail and motor transportation in their respective fields is the proviso contained in former Section 213(a)(1)—now Section 5(2)(b)—which requires that in any case where a railroad or a subsidiary of a railroad is an applicant before the Commission for approval of the purchase or acquisition of a motor carrier, the Commission may not grant such approval unless it finds that the transaction proposed will be consistent with the public interest and will enable such

carrier to use service by motor vehicle to public advantage in its operations.[3] The Commission in its application of this proviso has consistently interpreted it to mean that the proposed railroad-controlled motor service must be auxiliary to or supplemental of the rail service of the railroad involved. *Pennsylvania Truck Lines, Inc.—Control—Barker,* 5 M.C.C. 9 (1936); *Northland-Greyhound Lines, Inc.—Purchase—Liederback,* 5 M.C.C. 215, 216 (1937); *Niagara Frt. Lines—Purchase—Westlake & Albertson,* 5 M.C.C. 535, 537 (1938); *Southwestern Transportation Co.—Purchase—Hill & Howe,* 37 M.C.C. 83, 89 (1941). The Commission, from time to time, has varied the precise conditions which it believes necessary in a given case to insure that result. *United States* v. *Rock Island Motor Transit Co.,* 340 U.S. 419, 542 (1951). However, it has recognized, as it must, that the proviso of former Section 213 and the present Section 5(2)(b) lays down an absolute limitation upon the scope of railroad-controlled motor carrier service and that any railroad claim to operate a motor carrier service other than the limited service permitted by such proviso is one to be addressed to the legislature and not to the Commission. *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit,* 57 M.C.C. 4 (1950).[4]

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[3] There is a slight difference in the wording of the proviso as found in Section 213(a)(1) and Section 5(2)(b). The Commission has held that this difference is of no significance. *Scott Bros. Inc.—Control—W. G. Corp.,* 37 M.C.C. 225 (1941).

[4] The issue of the Commission's authority to grant unrestricted operating rights to a railroad-controlled motor carrier in certificate proceedings under Section 207 is now before the Court in *American Trucking Associates, Inc., et al.,* v. *United States* (Case No. 6) and *Railway Labor Executives' Association, et al.,* v. *United States* (Case No. 8), October Term, 1957.

The enforcement of this statutory requirement is important to the employees of the Frisco Railroad and to all rail employees because any deviation therefrom results in the abandonment of rail operations by railroads in favor of trucking service to the detriment of their job security.

In the present case, the majority of the District Court has invalidated Commission action to enforce this statutory limitation and has decreed that a railroad subsidiary must be permitted to operate an unrestricted motor service even though purchased subject to the limitations of Section 5. Such decision is, we believe, as set forth below, in direct conflict with the requirements of Section 213 (a)(1), now Section 5(2)(b), and the decisions of this Court delineating Commission authority thereunder and results in a destruction of the Congressional mandate with respect to the limitations on rail controlled motor services. It requires review and reversal by this Court.

1. The decision below validates an operation which the Commission did not have statutory power to authorize.

The action of the District Court permits Transportation Company to operate an unrestricted motor carrier service totally unrelated to its parent railroad's operations and without any regard at all to the limits of the statute under which the operations were acquired. There can be no serious argument that the Commission did not have statutory authority at the time it approved the purchase of the route segments involved to authorize an unrestricted service over those routes in substitution of the Railroad's train operations. The statute, in clear,

unambiguous language, required the Commission to limit those operations to services which involved coordinated rail-truck service. The Commission recognized this limitation and imposed such restriction upon its approval of the purchases. The majority of the District Court now says that the Commission is totally powerless to impose specific conditions, even after full notice and hearing, to keep the operation within the clear statutory limits, because it did not reserve such power in the certificates issued to cover the purchased routes. Such decision raises a certificate, a mere instrument to carry out statutory objectives, above the requirements of the statute itself. Appellants do not believe that this Court in the *Watson* case intended to say that a certificate which exceeded the statutory authority of the agency acquires in all circumstances an absolute immunity from any effort to amend so as to conform the operating authority it represents to statutory limitations. Yet, such is the holding of the District Court.

2. The decision below is contrary to this Court's decision in the Rock Island case.

Appellants also believe that the decision of the majority of the District Court is clearly contrary to this Court's opinion in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). In that case this Court sustained the power of the Commission to impose the identical conditions here involved upon certificates of a wholly owned subsidiary of a railroad in situations where (a) the Commission had reserved authority to do so in the certificate itself or (b) it had reserved authority to do so in its order approving a purchase of a route and

had not yet issued the certificate. In so holding, the Court stated (pp. 445-446):

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself."

This statement validates Commission action in a case like the present one where the orders approving Transportation Company's purchases pursuant to which the certificates were issued do contain a reservation of authority to later impose conditions, if necessary, to insure that the purchased operations are auxiliary to or supplemental of the parent railroad's train service.

3. A review of the decision below is required to clarify the Commission's authority with respect to railroad-affiliated motor services.

Assuming *arguendo* that the above quoted statement does not constitute an expression of this Court's approval of the Commission's action in the present case, it leaves that issue open for consideration and decision by this Court. Such fact is made clear by the Court's further statement (page 446) that if the Commission should undertake to restrict a railroad-affiliated motor carrier certificate without a reservation of authority either in the order directing issuance of the certificate or in the certificate itself, the answer to the validity of such action "should await a fully developed statement and argument by the interests affected." This appeal then at the very

least presents an important issue over which the Court should exercise jurisdiction in order to complete its determinations with respect to the scope of Commission authority over railroad-affiliated motor carrier certificates. Moreover, appellants submit that the answer to this question on the facts of the present case should result in an affirmance of the Commission's action and a reversal of the judgment below. The primary concern of the courts in this area should be to insure that the licensee is clearly on notice as to what he is getting and is not thereby misled. That objective is fully met by a reservation in an order approving a railroad subsidiary's purchase of motor carrier rights stating that the approval is subject to such future conditions as the Commission may find necessary to keep the purchased operations auxiliary to or supplemental of the railroad's train service. This is particularly so when such an order is issued pursuant to former Section 213, or present Section 5(2)(b), of the Interstate Commerce Act which prohibits a railroad or its subsidiary from acquiring and operating by purchase anything but coordinated rail-motor services.

4. The decision below deprives the Commission of power, after notice and hearing, to enforce statutory requirements by correcting inadvertent errors.

Assuming that ordinarily a reservation of authority of the type here involved should be placed in the certificate in addition to the Commission order approving the purchase, then appellants further submit that there is no rule of law which prevents the Commission from later using its reserve power where the omission from the certificate was inadvertent and full notice and opportunity to be heard is accorded

to the railroad affiliate prior to imposing additional conditions on the certificate. The Commission has consistently exercised authority to amend certificates which inadvertently did not reflect the terms of the orders directing or approving their issue. *Kenosha Auto Transport Corp.—Interpretation of Certificate,* 53 M.C.C. 85, 89 (1951); *Gray-Extension—General Commodities,* 52 M.C.C. 459, 460 (1951); *Petroleum Carrier Corp.* v. *Black,* 51 M.C.C. 717, 720 (1950); *A.C.E. Transp Co. Inc.—Interpretation of Certificate,* 47 M.C.C. 202, 203 (1947). Appellants submit that this Court has also recognized a power in the Commission to correct or revoke certificates erroneously issued. *Riss Co.* v. *United States,* 100 F. Supp. 468, 474, affirmed 342 U.S. 937; cf. *United States* v. *Seatrain Lines,* 329 U.S. 424, 428.

A similar authority has been exercised by the Civil Aeronautics Board under a statutory scheme modelled upon the Interstate Commerce Act and under which the Board exercises authority similar to that of the Commission. *Pan American Airways, Inc.—North Atlantic Route Amendments,* 7 C.A.B. 849 (1947). In the cited case, the Board, after notice and hearing, amended a certificate issued to Pan American Airways which had inadvertently, contrary to the findings in the Board's opinion granting the certificate, contained authority to serve Bermuda on a transatlantic air route.[5] Upon the basis of the reasoning of the majority of the District Court in the present case, this action of the Civil Aeronautics Board

[5] This action of the Board was approved by the President of the United States under Section 801 of the Civil Aeronautics Act [49 U.S.C. 601].

would have been declared invalid and the Federal Government would have been required under Section 406(b) of the Civil Aeronautics Act [49 U.S.C. 406(b)], to pay subsidy to Pan American for operations to Bermuda as a part of its North Atlantic operation.

5. The Court below erroneously substituted its judgment for that of the Commission on the issue of inadvertency in the omission of the reservation of authority from the certificates.

The majority of the District Court held that the finding of the Interstate Commerce Commission that the reservation of authority to impose future conditions had been inadvertently omitted from the certificates is without adequate support in the evidence. This holding is based upon misconceptions of the statute and of the proceedings before the Commission, and is clearly contrary to the established precedents with respect to the evidence necessary to support the Commission's findings.

The Court below expressed the view that the Commission was not correcting an inadvertent error, but was carrying out a new policy. (App. B, 15a). The concept that the conditions which the Commission here imposed upon the certificates of Transportation Company constituted a new Commission policy changing existing certificates was advanced to this Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, and specifically rejected by the Court (pp. 440 to 443).

The majority of the District Court also expressed the view that there was no inadvertent error because of the fact that the original conditional approval represented only the recommendations of a hearing ex-

aminer, not binding on the Commission, which were rejected when the certificates were issued (App. B, 13a, 14a). However, the reports of the Commission approving the purchases of the five route segments involved upon the basis of a coordinated rail-truck service and with a reservation of authority to impose future conditions were not merely the recommendations of a hearing examiner, but constituted formal actions of a Division of the Commission which were not appealed to the full Commission and which, under Commission practice, became the action of the Commission itself.

Finally, the majority below finds that the action of the Commission does not constitute correction of an inadvertent error because of a statement by the examiner in the reopened proceedings to the effect that the Commission would impose such restrictions as "are desirable" (App. B, 13a). A remark of an examiner during a hearing is obviously an inadequate basis for overriding an agency's findings.[6] The District Court simply substituted its judgment for that of the Commission with respect to the inferences to be drawn from the facts as to the Commission's prior procedures in this case, *State of Ohio v. United States*, 292 U.S. 498 (1934). The Commission is obviously the primary judge of the nature and significance of its orders, the manner in which they are issued, and the limitations upon its staff in the drafting

[6] Moreover, the examiner's statement quoted in the District Court's opinion clearly has reference to the question of what conditions should be imposed in order to carry out the statutory requirements and not to the issue of inadvertency in omitting conditions from the original certificates. This Court has already recognized in the *Rock Island* case, *supra*, p. 19, that the actual conditions imposed may vary from case to case.

of said orders, and its findings thereon are entitled to acceptance unless clearly wrong.

CONCLUSION

For the foregoing reasons, jurisdiction should be noted and the judgment of the District Court enjoining the Commission from enforcing the conditions imposed upon Transportation Company's certificates should be reversed.

Respectfully submitted,

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December 3, 1957

APPENDIX A

STATUTES INVOLVED

National Transportation Act of 1940 (49 U. S. C. 1 et seq.)

NATIONAL TRANSPORTATION POLICY (49 U. S. C., preceding sections 1, 301, 901 and 1001)

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

INTERSTATE COMMERCE ACT (49 U. S. C. 1 *et seq.*)

Section 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or

for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

Section 5 (2) (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: PROVIDED, That if a car-

rier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Sec. 212 (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license; *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary au-

thority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 213 (a) (1) [49 U. S. C. Section 313 (a) (1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205 (f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as defined in section 1(3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, a corporation, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*.

Memorandum Opinion

Before VAN OOSTERHOUT, Circuit Judge, MOORE and HARPER, District Judges.

Appearances:

John E. McCullough, Ernest D. Grinnell, Jr., A. J. Baumann, St. Louis, Missouri, appeared on behalf of the plaintiff, Frisco Transportation Company, a corporation.

Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, and Maurice A. Fitzgerald, Attorney, Department of Justice, Washington, D. C., appeared on behalf of the United States of America, defendant.

C. H. Johns, Asst. General Counsel, Interstate Commerce Commission, Washington, D. C., and Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, appeared on behalf of the Interstate Commerce Commission, defendant.

B. W. LaTourette, St. Louis, Missouri, appeared on behalf of Viking Freight Company, Be-Mac Transportation Company, C. E. S. Truck Lines and L. A. Tucker Truck Lines, intervenors.

Peter T. Beardsley, Washington, D. C., appeared on behalf of American Trucking Association, Inc., and its Regular Common Carrier Conference, intervenors.

Carroll J. Donohue, St. Louis, Missouri, and James L. Highsaw, Washington, D. C., appeared on behalf of Railway Labor Executives Association, intervenors.

Wentworth E. Griffin, Kansas City, Missouri, appeared on behalf of Campbell "66" Express, intervenor.

HARPER, Judge.

This is an action by the Frisco Transportation Company, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission entered on December 7, 1953, which order purports to cancel certain certificates, and at the same time new or amended certificates would be issued.

This court has jurisdiction of the subject matter of this action, 28 USCA, Sec. 1326, and the case was heard by a court composed of three judges pursuant to Sections 2321-2325, 28 USCA.

At issue in this proceeding is the propriety of the cancellation and re-issue in restricted form of five operating certificates authorizing motor carrier operation by plaintiff in areas adjacent to those served by the Frisco Railroad. The Commission contends that four of these certificates issued in the year 1942 were incomplete in form in that they failed to include, due to a clearical error, a reservation of the power to restrict the operations of plaintiff by imposing limitations designed to insure that plaintiff's motor carrier service would be auxiliary and supplemental to the parent company's rail service, the necessity and propriety of such reservations of power having been determined in the finance hearings conducted when plaintiff sought to purchase truck routes from those then operating them. Plaintiff denies that such certificates were in fact issued with an inadvertent omission of the reservation of power previously determined necessary,

and asserts further that, even should this be the case, the Commission is without power to correct them at this time, its power in this respect being limited by Sec. 212(a) of the Interstate Commerce Act, 49 USCA, Sec. 312(a).

With respect to the fifth certificate (Bennett), the plaintiff asserts that the Commission is without power to restrict its operation.

Under consideration in the original hearings of 1938 and 1939 and in the re-opened Commission proceedings beginning in 1945, which resulted in this action being brought, were six truck routes identified before us by the name of the vendor from whom purchase was authorized. These are the "Cooper" route from Joplin, Missouri, to Carthage, Missouri; the "Hamm" route from Joplin, Missouri, to Miami, Oklahoma; the "Tolson" route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the "Parker" route from Blytheville, Arkansas, to Memphis, Tennessee; the "Rose" route from Hugo, Oklahoma, to Paris, Texas; and the "Bennett' route from Blytheville, Arkansas, to Lake City, Arkansas. In its reconsideration of the "Rose" certificate the Commission ordered no change. The operating certificate for the "Bennett" route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, rehearing denied 341 U.S. 906, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate. These restrictions are as follows:

> "1. The service to be performed by the Frisco Transportation Company, hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereinafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

"2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

"3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amery-Tupelo (considered as one), Miss.

"4. All contractual arrangements between the Transportation Company and the Railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

"5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway."

Determination of the propriety of the change made in the four remaining certificates requires a somewhat more detailed examination of the administrative history of the certificates which plaintiff seeks to retain unaltered. In 1938 and 1939, finance hearings were held by an examiner for the Commission with regard to the acquisition of truck routes by plaintiff, organized in 1937, to provide co-ordinated rail-motor carrier service. After the finance hearings on these four acquisitions the examiner made his report approving acquisition by plaintiff of the routes, but in each case concluded his report with the following language:

"* * * Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition.

Following the finance hearings, Division 5 of the Interstate Commerce Commission approved and adopted the report of the Hearing Examiner, with one commissioner dissenting. Following the action by Division 5 of the Commission, the plaintiff completed the purchase, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

Thereafter, in June and July of 1939, compliance orders were issued by Division 5 of the Commission with respect to the four routes in question. The compliance orders do not contain the limitations contained in the findings in each of the finance proceedings. In 1942, certificates were issued by the Commission to the plaintiff with respect to each of the four routes, which certificates do not contain the limitations contained in the findings in each of the finance proceedings.

In July, 1941, before the issuance of the certificates under consideration, competing motor carriers filed complaints with the Commission alleging that plaintiff was operating a motor carrier service independent of parent Railway's rail service and in contravention of the condition imposed by the Commission in the finance hearings. Proceedings were had by the Commission to inquire into these complaints, and the Commission in 1946 concluded that plaintiff was not operating in violation of the terms of its certificates. The Commission indicated, however, that the ruling should not be taken as sanctioning such operation, since the proceedings pursuant to which the certificates in question were issued to the plaintiff had in fact already been re-opened for further hearing. The Commission had started these hearings in 1945, in Division 5, and Division 5 held that the operating certificates had been issued with an inadvertent omission of the proviso set out in the report of the finance hearings, and directed the cancellation and re-issue of the certificates.

Upon a petition for reconsideration presented to the full Commission, the matter was reheard by it in November, 1952. A report of the Commission issued in December, 1953, upheld the action of Division 5 in incorporating the restrictions in the operating certificates, in a divided opinion, four commissioners dissenting and one not participating. A petition for reconsideration was denied by the Commission in April, 1955, and this action was commenced a month later.

A three-judge court, in *Watson Bros. Transportation Co.* v. *U. S.*, 132 F. Supp. 905 (Affirmed 350 U.S. 927), said, l.c. 909:

> "Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued.

The court in the above language clearly indicates that certificates duly issued cannot be modified in the manner sought to be modified in the case before us, even though some prior report of the Commission indicates to the contrary. This is clearly borne out by the dissenting opinion of Judge Johnsen in that case, wherein he said, l.c. 909-10:

> "The effect of the majority opinion is to hold that, where the Commission has defined the scope of public convenience and necessity existing in a particular situation, by a finding such as the statute requires, but it has in some manner issued a certificate in excess of or contrary to the limits of the public convenience and necessity so found, it can not call in the certificate or engage in any correction or reissuance thereof, in order to make the certificate conform to its finding, unless it grants the holder a hearing."

The case before us with respect to the four certificates in question is a much stronger case on the part of the plaintiff insofar as the facts are concerned than the *Watson Bros.* case. Here intervening between the issuance of the finance report and the certificates in question, was issuance by the Commission of compliance orders, which did not contain the limitation contained in the findings in the finance proceedings. The action of the Commission in adopting the finance hearing report was not unanimous. Between the time that the compliance orders were issued and the four certificates were issued, a certificate was granted with respect to the Bennett route, in which the limitations were imposed. Thereafter, and before the certificates were issued by the Commission, proceedings were instituted by competing motor carriers, complaining that the restrictions set up in the finance hearing report were applicable and that the plaintiff was operating in contravention of those conditions.

After all of these things had occurred the four certificates in question were issued. We must bear in mind that insofar as the Commission is concerned, that the words "auxiliary to" or "supplemental of" are not taken from the Act as set forth in the *Rock Island* case, supra. At pages 433-34, the court said:

> "But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental to rail service does not necessarily imply power to change the conditions designed to bring about the desired coordination, after issuance of the certificate. The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate."

The Commission in *Smith Bros. Revocation of Certificate,* 33 M.C.C. 465, l.c. 472, said:

> "We may issue decision upon decision and order upon order, on an application for a certificate so long

as sufficient reason therefore appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or degree marks the end of a court proceeding.

As was said by the Supreme Court in the *Rock Island* case, supra, l.c. 448:

> "What slight bearing *Seatrain* has weighs on the side of the interlocutory character of the approval order. The sentence referred to reads:
>
> "'But, as the Commission has said as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.'"

Under the *Watson Bros,* decision, the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error.

While the above disposes of the case, we are futher persuaded that no clerical error exists. The functions of the reviewing court are exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Rochester Telephone Co.* v. *U. S.*, 307 U.S. 125; *Mississippi Valley Barge Line* v. *U. S.*, 292 U.S. 282.

In the *Mississippi Valley Barge Line* case, supra, l.c. 286-87, the Supreme Court said:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The courts, however, have held in reviewing administrative orders that the orders must be supported by evidence. In *Lang Transportation Corporation* v. *U. S.*, 75 F. Supp. 915, l.c. 924, the court said:

> "Orders of the Interstate Commerce Commission which are contrary to and without adequate support in the evidence are void and have been consistently set aside by the courts." Citing *Eastern Central Motor Carriers Association* v. *U. S.*, 321 U.S. 194; *Florida* v. *U. S.*, 282 U.S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U.S. 258, and a number of district court cases.

In the instant case the four orders last referred to are without adequate support in the evidence. The history of the case we have set forth above clearly demonstrates that what was sought to be accomplished here, at this late date, was to restrict the operations of the plaintiff, not because a clerical error had occurred, but based upon the question of whether or not such was desired. A statement by Examiner Croft, at page 59 of the transcript of the hearing, bespeaks as much when he said during the hearing, before testimony was introduced:

> "Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction."

Where does this indicate that the restrictions will be the result of correcting a clerical error or that the hearing is about a clerical error? The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission, with one dissent. Who would say that the Commission is bound by the recommendations

of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.

Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certifiate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all of this, the Commission would have us believe that the purported changes are made as the result of clerical error.

While, as set out above, under the *Watson Bros.* case we are of the opinion that the four certificates cannot be canceled as a result of the hearing conducted by the Commission since it was not conducted under Sec. 212 of the Act, yet, if we agreed with the dissenting opinion in the *Watson Bros.* case, we would still be of the opinion in this case that the four certificates in question could not be canceled anr reissued because no clerical error in fact existed. We would not overrule the actions of the Commission taken at the time that the compliance orders were issued, and the certificates were issued merely because the hearing examiner at the finance hearings would have put limitations on the certificates. For us to hold that the members of the Interstate Commerce Commission are bound by the recommendation of a hearing examiner in his report, a report that was adopted by a divided division, would be to hold that the members of the Commission could not have minds of their own.

Clerical errors should be readily apparent. Such is not the case here. Four of the members of the Commission dissented and one took no part. Two of the commissioners

wrote dissents setting out that in their opinion the record does not justify the finding of the majority of the Commission.

The arguments advanced here for the defense are the arguments of the minority opinion in the *Watson Bros.* case, supra. What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such.

Judgment will accordingly be for the plaintiff with respect to the "Cooper", "Hamm", "Tolson" and "Parker" routes, and the action of the Commission confirmed with respect to the "Bennett" route. Attorneys for the plaintiff will prepare the appropriate Findings of Fact, Conclusions of Law and Judgment, and present same to the court for entry.

M. D. VAN OOSTERHOUT
U. S. Circuit Judge

.....
U. S. District Judge

ROY W. HARPER
U. S. District Judge

MOORE, Judge

Reluctantly, I must dissent from the opinion of the majority, believing as I do that the Interstate Commerce Commission acted correctly. After examining the record, I am persuaded that the omission of the proviso from the operating certificates (other than the "Bennett" certificate) was, in fact, a clerical error on the part of the Commission and not, as plaintiff alleges, the result of an intentional decision to reverse the determination made at the

finance hearings at which both plaintiff and competing carriers participated and offered evidence. The unrestricted compliance orders which are at variance with the finance hearings determinations were made without any hearing at which intervenor motor carriers might have been heard. The intervening motor carriers and the defendant Commission did not sleep on their rights in this matter. Protests were filed with the Commission even before the operating certificates were issued. I think it is significant that rail-affiliated motor carrier applications for authority to offer motor-carrier services to the public were a distinct minority of the total number of motor carrier service authorizations sought in the 'thirties and the 'forties; no doubt those charged with the responsibility of issuing compliance orders and operating certificates found it easy to omit the proviso which was required on only a few of the motor carrier certificates with which the Section of Certificates dealt. I think it is also noteworthy that plaintiff did not file a petition for reconsideration after the conclusion of the finance hearings, as was its right under the procedural rules of the Commission. *I.C.C. General Rules of Practice, 101 (a).*

I cannot see that Transportation Company's case would be any stronger if I were in fact persuaded that the omissions from the finance orders and certificates were intentional. I do not see how plaintiff could justify changes in the Commission's findings made without giving notice, or an opportunity to be heard to those appearing at the acquisition proceedings. *49 U.S.C.A. Sec. 305(a).*

I cannot accept the view of the majority that the Watson Bros. Transportation Co. case is controlling. The basis for my view is that the "power to modify" issue which the Watson case is supposed to have settled was expressly reserved by the Supreme Court in the Rock Island case *supra.*

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor

carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected." 340 U.S. 419, 445.

The decision of the three-judge court in that case was affirmed in the Supreme Court on motion. Rule 16-1(c) of the Revised Rules of the Supreme Court provides:

"The Court will receive a motion to affirm a judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." 1954, 346 U.S. 951, 964.

The language of this rule persuades me that the Supreme Court did not affirm the decision below on this inadvertence issue, but rather on the lack of hearing and notice. I believe the section of the Interstate Commerce Commission Act, Sec. 212(a), which plaintiff offers in support of its position, is intended to prevent the Commission from making changes in certificates when such certificates have been lawfully issued in accordance with previous findings of the Commission made after due notice and hearing. I do not think that, for example, if in these administrative proceedings the Section of Certificates had erroneously issued a certifiate of authority to an intervenor motor carrier instead of to Frisco Transportation Company that such a mistake would permanently tie the hands of the Commission and thus nullify the previous findings made in the prior administrative hearings. On the issue of due process raised by the plaintiff I shall say only that I do not believe anyone can acquire an indefeasible interest in a mistake. I see no good reason in the absence of any clear legislative mandate to hold that so powerful an ad-

ministrative agency as the Interstate Commerce Commission is unable to correct the clerical errors made by a subordinate entity not empowered to vary the findings and decisions of its creators.

DATED this 28th day of June, 1957.

(Signed) GEO. H. MOORE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI—EASTERN DIVISION

CIVIL ACTION No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *et al*, *Defendants*.

Judgment

This cause came on for final hearing on the complaint herein, praying for a decree enjoining and restraining the United States and its agency, the Interstate Commerce Commission, from enforcing the order of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption of MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and the chief judge of the United States Court of Appeals for the Eight Circuit having called to the assistance of the Honorable George H. Moore, to hear and determine this cause, the Honorable Martin D. Van Oosterhout, Judge of the Court of Appeals for this Circuit, and the Honorable Roy W. Harper, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to Section 2281 of Title 28 of the United States Code, and said cause and the evidence therein having been heard before said three judges, it is

Ordered, adjudged and decreed that the United States of America and its agency, the Interstate Commerce Commission, be and they are hereby enjoined from enforcing the second ordering paragraph of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and said second ordering paragraph is hereby forever set aside, suspended and annulled. The relief sought by plain-

tiff in connection with its certificate bearing No. MC-89913 (Sub No. 10) is denied, and the Interstate Commerce Commission's Order with respect thereto is affirmed.

Dated Aug. 9th, 1957.

/s/ MARTIN D. VAN OOSTERHAUT
United States Circuit Judge

/s/ ROY W. HARPER
United States District Judge

GEORGE H. MOORE,
United States District Judge, dissenting.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI—EASTERN DIVISION

CIVIL ACTION No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *et al*, *Defendants*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. (a). Plaintiff, Frisco Transportation Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of St. Louis, Missouri.

(b) United States of America is named a defendant pursuant to Section 2322 of the Judicial Code, 28 USCA Section 2322.

(c). The Interstate Commerce Commission intervened as a defendant in accordance with the provisions of Section 2323 of the Judicial Code, 28 USCA Section 2323.

(d). Be-Mac Transport Company, Inc.; Viking Freight Company, C.E.S. Truck Lines, Inc.; L. A. Tucker Truck Lines, Inc.; Consolidated Forwarding Company, Inc.; American Trucking Associations, Inc. and its Regular Common Carrier Conference; Railway Labor Executives Association; Brotherhood of Railroad Trainmen; Order of Railway Conductors and Brakemen of America; and Campbell "Sixty-Six" Express, Inc. were allowed to intervene as parties defendant after the filing of appropriate petitions for leave to intervene.

2. Plaintiff is a common carrier by motor vehicle engaged in the transportation of persons and property in interstate and intrastate commerce, and is a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, a common carried by rail subject to the Interstate Commerce Act.

3. In this suit we are asked to review an order of the Interstate Commerce Commission cancelling certain operating certificates of plaintiff bearing the numbers MC 89913 Sub. No. 1 (Hamm), MC 89913 Sub. No. 3 (Cooper), MC 89913 Sub. No. 5 (Parker), MC 89913 Sub. No. 6 (Tolson), and requiring the issuance of new or amended certificates in lieu thereof. We are also asker to review the same order insofar as it modifies a certificate of plaintiff bearing number MC 89913 Sub. No. 10 (Bennett). The names in parentheses are the parties from who plaintiff purchased the operating rights represented by these certificates. These names will some times be used in referring to the certificates in these findings and conclusions.

4. The proceedings before the Commission also involved plaintiff's certificate bearing number MC 89913 sub. No. 2 (Rose), but since the Commission did not order any modification of that certificate, no action by this Court is necessary on the portion of the order dealing therewith. Therefore, the remaining findings of fact do not apply to that certificate.

5. On October 17, 1939, plaintiff filed an application to purchase a portion of the motor carrier operating rights and property of Bennett. After hearings were held, the Commission approved said purchase on March 15, 1940. A memorandum decision reporting this approval appears in 35 MCC 802. On June 13, 1940, the Commission granted plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 10, authorizing plaintiff to engage in interstate or foreign commerce as a common carrier by motor vehicle over the operating rights purchased from said Bennett, which said certificate contained the following:

> "The operations herein authorized are subject to such further limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition."

6. During the years 1938 and 1939, plaintiff filed applications to purchase the motor carrier operating rights and properties of Hamm, Cooper, Parker and Tolson. After finance hearings were held, Examiner's Proposed Reports were issued in connection with each of these applications, which Reports approved the purchase by plaintiff of the operating rights and properties of these motor carriers and concluded with the following language:

> "• • • Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition."

7. Division 5 of the Interstate Commerce Commission approved and adopted the Reports of the hearing Examiners, with one Commissioner dissenting in each case. These

Reports appear as follows: Hamm-15 MCC 320; Cooper-15 MCC 317; Parker-25 MCC 96; Tolson-25 MCC 96.

8. Following the action by Division 5 of the Commission, plaintiff completed the purchases, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

9. On March 11, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Cooper, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order (commonly refered to as a "compliance order") in Docket MC 89913 Sub. No. 3, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph D. Cooper, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 3, including inter alia the operating rights purchased from Cooper, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

10. On March 14, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Hamm, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 1, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by John

Hamm, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 1, including inter alia the operting rights purchased from Hamm, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

11. On June 16, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Parker, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 5, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph W. Parker, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 5, including inter alia the operating rights purchased from Parker, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

12. On July 10, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Tolson, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 6, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering op-

erating authority previously applied for by Louis Tolson, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 6, including inter alia the operating rights purchased from Tolson, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

13. In July 1941, prior to the issuance of the certificates of public convenience and necessity in Cooper, Parker, Hamm and Tolson, competing motor carriers filed complaints with the Commission, alleging that plaintiff was operating a motor carrier service independent of its parent railroad's rail service and in contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that plaintiff was not operating in violation of the terms of its certificates (46 MCC 22). The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the Hamm, Cooper, Parker and Tolson certificates were issued to plaintiff had been reopened for further hearing.

14. The proceedings which resulted in the Commission's order of December 7, 1953, had their beginning on January 4, 1945, when the Commission entered an order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker and Tolson certificates.

15. On April 8, 1946, such reopened proceedings were heard by a hearing Examiner. During that hearing, the hearing Examiner made the following statement:

> "Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-

called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction." (59 of Transcript).

16. On May 17, 1948, a recommended report and order on further hearing was filed by Examiners William T. Croft and Beverly S. Simms.

17. After exceptions were filed, Division 5 of the Commission issued its report on further hearing on October 22, 1951. This report appears in 53 MCC 415.

18. After plaintiff filed a petition for reconsideration of the report of Division 5, the Commission reopened the proceedings for oral argument, and after such argument, the Commission modified the report of Division 5 by its report of December 7, 1953, which appears in 62 MCC 367. The order under attack was entered pursuant to this report.

19. Plaintiff's petition for reconsideration of this report and order was filed on February 2, 1954, and was denied by the Commission on April 4, 1955.

20. Plaintiff filed this suit on May 20, 1955, and on the same date a temporary restraining order was entered which enjoined the enforcement of the order of December 7, 1953, and the order of April 4, 1955.

21. The facts as to the various steps in the handling of this case beginning in 1938 and extending through the issuance of the certificates in 1942, as stated in findings of fact 6-13 inclusive herein, do not support the Commission's finding that such certificates were issued in their unrestricted form as a result of a clerical error or errors. Rather, a complete examination of the record fails to disclose any evidence that a clerical error in fact existed in the issuance of the certificates in question.

22. There was no evidence of record before the Commission which could be used as a basis for finding that a clerical error existed in the issuance of plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

Conclusions of Law

1. This is an action to enjoin, set aside, suspend and annual an order of the Interstate Commerce Commission entered on December 7, 1953 (62 MCC 367), which order purports to cancel certain operating certificates of plaintiff and at the same time issue new or amended certificates.

2. This Court has jurisdiction of the subject matter of this action, 28 USCA Sec. 1326, and the case was heard by a Court composed of three judges pursuant to 28 USCA Sec. 2321-2325.

3. Since the Commission did not order the cancellation or modification of the certificate bearing number MC 89913 Sub. No. 2 (Rose), no action by this Court is necessary in connection with the certificate bearing that number.

4. The Commission's action with respect to the certificate bearing number MC 89913 Sub. No. 10 (Bennett) was within its powers in view of the reservation of the power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, rehearing denied 341 U.S. 906, the Commission's action with regard to that certificate is affirmed and no injunction should issue as to that part of the order.

5. Plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1 (Hamm); MC 89913 Sub. No. 3 (Cooper); MC 89913 Sub. No. 5 (Parker); MC 89913 Sub. No. 6 (Tolson) were duly issued.

6. The granting of a motor carrier certificate by the Commission marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. *Smith Bros. Revocation of Certificate*, 33 MCC 465, 472.

7. Motor carrier certificates duly issued cannot be modified in the manner in which plaintiff's certificates in this case were sought to be modified by the Commission, even though some prior report indicates the contrary. *Watson Brothers Transportation Company* v. *U. S.*, 135 F.S. 905 (affirmed 350 U.S. 927).

8. Section 212-(a) of the Interstate Commerce Act, 49 USCA Section 312-(a), sets forth the only basis for revocation of a motor carrier certificate as follows:

> "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder * * *."

9. The action taken by the Commission in cancelling the Hamm, Cooper, Parker and Tolson certificates on the ground that said certificates were "inadvertently issued", is an attempt made contrary to Section 212 of the Interstate Commerce Act to revoke or change a certificate duly issued, and is more than the mere correction of a clerical error.

10. Orders of the Interstate Commerce Commission must be supported by adequate evidence. *Lang Transportation Corp* v. *U. S.*, 75 F.S. 915, 924; *Eastern Central Motor Carriers Assn.* v. *U. S.*, 321 U.S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U.S. 258; *Florida* v. *U. S.*, 282 U.S. 194

11. The finding in the order of December 7, 1953, that the Hamm, Cooper, Parker and Tolson certificates were "inadvertently issued" is without adequate support in the evidence.

12. Clerical errors must be readily apparent, and the alleged clerical errors in this case are not apparent.

13. Failure by the Commission to follow Examiner's proposed report is not a sufficient showing to prove that a clerical error existed.

14. The issuance of compliance orders as found in findings of fact 9, 10, 11 and 12, and the existence of a pending complaint challenging plaintiff's right to operate over these certificates as found in finding of fact 13, together with the statement by the hearing Examiner as found in finding of fact 21, and the issuance in 1940 of a restricted certificate in connection with plaintiff's Bennett purchase, negate the existence of clerical error in the issuance of the Hamm, Cooper, Parker and Tolson certificates, and compel the conclusion that no clerical error existed in the issuance of those certificates.

15. The Commission's order of December 7, 1953, as it applies to plaintiff's certificates bearing numbers MC

89913 Sub. No. 1, MC 89913 Sub No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6, should be enjoined, set aside, suspended and annulled because said order is contrary to the provisions of Section 212 (a) of the Interstate Commerce Act, 49 USCA Section 312 (a).

16. In addition, because the Commission's finding that said certificates were issued as a result of clerical error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled.

17. Either of the reasons stated in conclusions of law 15 or 16 would be sufficient in and of itself to require that the order be enjoined, set aside, suspended and annulled.

18. Because of our conclusion as stated in conclusion of law 15, it has not been necessary for us to consider the additional evidence offered by plaintiff at the hearing before this Court. Our consideration has been limited to the record made before the Commission beginning with the January 4, 1945 order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker, Tolson, Rose and Bennett certificates, in accordance with the well-established principle that "* * * the validity of the order [of the Interstate Commerce Commission] must be determined upon evidence introduced before the Commission." *Lousiville & Nashville Railroad Company* v. *United States,* 245 U.S. 463, 466. This principle requires that we give no consideration to matters not in the record before the Commission, but even were it proper for us to take into consideration matters such as those tendered by the Interstate Commerce Commission at the hearing before this Court, our conclusions as stated in conclusions of law 15 and 16 would not be different.

19. A permanent injunction should issue enjoining the enforcement of the provisions of the December 7, 1953,

order as it applies to plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1; MC 89913 Sub. No. 3; MC 89913 Sub. No. 5 and MC 89913 Sub No. 6.

20. No injunction should issue in connection with said order as it applies to plaintiff's certificate bearing the number MC 89913 Sub. No. 10.

(s) MARTIN D. VAN OOSTERHANT
United States Circuit Judge

(s) ROY W. HARPER
United States District Judge

George H. Moore, United States
District Judge, dissenting.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-89913 (Sub-No. 1).[1]

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-MIAMI.

Decided December 7, 1953.

Upon oral argument, findings in prior report, 53 M. C. C. 415, modified. Certain certificates heretofore issued to Frisco Transportation Company canceled on finding that they were inadvertently issued. Conditions imposed in certificates authorized to be issued in lieu of those canceled and in certificate No. MC-89913 (Sub-No. 10) in order to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to, or supplemental of, rail service. Other prior reports: 15 M. C. C. 317, 15 M. C. C. 320, 15 M. C. C. 323, 25 M. C. C. 96, 35 M. C. C. 132, and 35 M. C. C. 802.

Appearances as shown in prior reports and, in addition, *J. E. McCullough* for a transportation company; and *James F. Pinkney* for an intervener in opposition.

Report of the Commission on Oral Argument.

By the Commission:

These proceedings involve principally the issue of whether certain certificates heretofore issued the Frisco Transportation Company, a wholly owned subsidiary of

[1] This report embraces the proceedings listed in appendix A hereto.

the St. Louis-San Fransciso Railway Company, hereafter called the Transportation Company and the railroad, respectively, were inadvertently issued.

In its report on further hearing, 53 M. C. C. 415, division 5 found that the certificates issued to the Transportation Company in the proceedings listed in part I of appendix A hereto, except No. MC-89913 (Sub-No. 10), were inadvertently issued; that such certificates should be revoked and at the same time new or amended certificates in conformity with the findings in the proceedings listed in part II of appendix A hereto and which require that all future operations conducted thereunder shall be subject to the limitations or restrictions set forth in appendix B hereto, should be issued in lieu thereof; and that the certificate issued in No. MC-89913 (Sub-No. 10), should be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B.

Upon petition of the Transportation Company, to which Campbell Sixty-Six Express, Inc., an intervener in opposition, and the American Trucking Associations, Inc., and Regular Common Carrier Conference of the American Trucking Associations, Inc., interveners, replied, for good cause shown, by order entered July 7, 1952, we reopened the proceedings and the parties have been heard in oral argument. The facts are set forth in the prior report on further hearing, 53 M. C. C. 415, in considerable detail and need be restated herein only to the extent necessary for clarity of discussion and a determination of the issues presented by the petitions and at the oral argument.

The Transportation Company holds certificates authorizing motor common carrier operations over an extensive system of regular routes in Missouri, Arkansas, Tennessee, Mississippi, Kansas, Oklahoma, and Texas. More specifically, its routes extend from St. Louis, Mo., on the northeast, Memphis, Tenn., and Columbus, Miss., on the south-

east, and Kansas City, Mo., on the north, to Oklahoma City, Okla., and Dallas, Tex., on the southwest. They aggregate several thousand miles, of which about 284 miles are involved in the subject proceedings. Although these authorized routes parallel generally the lines of the railroad, there are substantial segments which reach or traverse a considerable area not served by the railroad, and in a number of instances connect divergent rail lines. All of the routes, except about three, were acquired through the purchase of the operating rights of various independent motor carriers. The character of the operations authorized over the system in general will be described briefly in order that the matters here in issue may be more fully understood. No restrictions limiting the operations to a rail auxiliary or supplementary service[2] are imposed on the routes (1) between St. Louis and Carthage, Mo., via Springfield, (2) between Kansas City and Springfield, (3) between Lebanon and Collins, Mo., which connects the two preceding routes north of Springfield, (4) between Alma, Ark., and Springfield, (5) between Dallas, Oklahoma City, and Miami, Okla., (6) between Memphis and Columbus, and (7) between Jonesboro, Ark., and Memphis. Operations over these routes are, however, in certain instances limited to service at rail stations or at points not more distant than 10 miles from rail stations of the railroad. The routes between St. Louis and Hoxie, Ark., via Cabool, Mo., partly over the route described in (1) above, and between Springfield and Cabool are subject to two restrictions. One limits the service to points within 10 miles of rail stations, and the other designates St. Louis and Memphis as key points.[3] Extend-

[2] Such a restriction permits only all-motor movements in the handling of rail traffic at railroad rates and on railroad bills of lading. See *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, 726.

[3] The key-point restriction precludes the transportation of shipments between the points designated as key points, or through, or to, or from, more than one such point.

ing from the last-named routes are routes into Van Buren and Mountain View, Mo., operation over which is also subject to key-point restrictions at St. Louis and Memphis. The routes between St. Louis and Blytheville and certain other points in Arkansas and Missouri are subject to all of the conditions usually imposed in operations of this character, including the designation of St. Louis, Chaffee and Hayti, Mo., and Blytheville as key points and a restriction against transporting shipments by truck between St. Louis and points south or west of Chaffee. The usual conditions, including a rail-haul condition,[4] are also applicable on the routes between Datto and Walnut Ridge, Ark., between Lake City and Nettleton, Ark., and between Marked Tree and West Ridge, Ark.

The six certificates involved in the instant proceedings are listed in part I of appendix A. These certificates, except No. MC-89913 (Sub-No. 10), were issued pursuant to approved purchases of the operating rights of several independent motor carriers as shown in part II of appendix A. The certificate in No. MC-89913 (Sub-No. 10) was issued pursuant to the purchase approved in No. MC-F-1037 and it alone contains a specific condition subjecting the operations to such future limitations as we may find necessary to impose in order to insure that the service performed shall be auxiliary to, or supplemental of, rail service. The circumstances leading to the issuance of each of these six certificates are discussed in considerable detail in the prior report beginning at page 418 and we see no need to repeat them here. Briefly, division 5 approved the purchases by the Transportation Company of the operating rights (1) of John Hamm between Miami and Joplin, Mo.,

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[4] The rail-haul condition requires that the shipments transported by truck receive an immediately prior or immediately subsequent movement by rail.

(2) of J. A. Rose from[5] Hugo, Okla., to Paris, Tex., (3) of Joseph D. Cooper between Joplin and Carthage, Mo., (4) of Joseph W. Parker between Blytheville and Memphis, (5) of Louis Tolson between Walnut Ridge and Memphis, and (6) of T. N. Bennett between Lake City and Blytheville. The operating rights so purchased were later assigned Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 2), MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), MC-89913 (Sub-No. 6), and MC-89913 (Sub-No. 10), respectively.

In each of the proceedings approving the above-described purchases (see part II of appendix A), a finding was made that the purchase would be consistent with the public interest, that it would promote the public interest by enabling the railroad to use service by motor vehicle to public advantage in its operations, and that it would not unduly restrain competition. In each instance, however, the approval was made subject to a definite proviso reserving the right to impose such limitations or restrictions as the Commission might find necessary in order to insure that the service performed "shall be auxiliary or supplementary to the train service" of the railroad, and shall not unduly restrain competition. The certificate issued in each of these proceedings except in No. MC-89913 (Sub-No. 10) does not contain this limitation. The certificate in No. MC-89913 (Sub-No. 10), although it carries no restriction as to the character of the motor service authorized, does contain a

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[5] Pursuant to the findings in *Frisco Transp. Co. Common Carrier Application*, 18 M. C. C. 826, a certificate, No. MC-89913, was issued the Transportation Company on March 2, 1940, authorizing it to transport general commodities, with exceptions, from Paris to Hugo, serving all intermediate points. The findings in that proceeding do not contain any restriction as to the character of service authorized, or any reservation of a right later to restrict in any manner. On March 31, 1942, a consolidated certificate was issued the Transportation Company embracing the operating authority granted pursuant to the findings in the cited proceeding and those acquired through purchase from J. A. Rose.

specified reservation of a right in this Commission later to restrict for the purpose indicated.

Before discussing the matters raised on petition and at the oral argument, it may be well to review briefly the events which preceded the instant proceedings. In July, 1941, Campbell Sixty-Six Express, Inc., and certain other motor common carriers filed a complaint alleging that the Transportation Company, with the cooperation of the railroad, was conducting certain operations as a motor common carrier, in interstate or foreign commerce, in violation of section 206 (a) and other sections of the Interstate Commerce Act, and has willfully failed to comply with our orders, rules and regulations governing motor common carrier operations. In *Campbell Sixty-Six Exp., Inc.*, v. *Frisco Transp. Co.*, 43 M. C. C. 641, a majority of division 5 found that certain certificates under which the Transportation Company was operating authorized the performance only of service which was strictly auxiliary or supplementary to the rail service of the railroad, and that the performance of a direct motor-carrier service to the public was unauthorized and should be discontinued. No order was entered, but the division stated that certain proceedings in which certificates were issued to the Transportation Company would be reopened for the purpose of determining what, if any, conditions or restrictions should be imposed in the certificates to remove all doubt about the character of operations which the Transportation Company was authorized to acquire and in which it is authorized to engage. Subsequently, division 5, on its own motion, reopened the proceedings covered by this report for reconsideration and thereafter they were reopened for further hearing. In our report on oral argument in *Campbell Sixty-Six Exp., Inc.* v. *Frisco Transp. Co.*, 46 M. C. C. 222, hereafter called the *Campbell Sixty-Six case*, we disapproved the division's finding that the Transportation Company had been engaged in operations unauthorized by the certificates as then phrased, but stated (page 225):

Nothing that we say here, however, should be taken as an indication that the certificates now held by the Transportation Company may not be corrected to reflect the intent of the findings in the acquisition proceedings or that restrictions may not be imposed now in some or all of the certificates held by the Transportation Company which will have the effect of limiting the service thereunder to that which is auxiliary to or supplementary of the rail service of its parent company and preclude it from performing a direct and independent motor common carrier service. Whether the certificates held by the Transportation Company, which do not contain the conditions imposed in the acquisition proceedings, were inadvertently issued is not here determined. Since the prior report, a number of the proceedings pursuant to which certificates were issued to the Transportation Company have in fact been reopened for further hearing. The conditions, if any, which may and should be imposed will be considered in the reopened proceedings.

As seen, the certificate issued to the Transportation Company in No. MC-89913 (Sub-No. 10) contains a provision stating that the operations authorized are subject "to such further limitations, restrictions, or modifications" as we may find it necessary to impose, in order to insure that the service "shall be auxiliary or supplementary to the train service" of the railroad. There is now no question that we may, if we find it necessary, impose limitations or restrictions as to the service to be rendered under this certificate. See *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, hereafter called the *Rock Island* case. Whether any limitations or restrictions should be imposed will be hereinafter discussed.

The first and most important issue to be determined is whether the omission from the certificates issued to the Transportation Company in Nos. MC-89913 (Sub-No. 1),

MC-89913 (Sub-No. 2), MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), and MC-89913 (Sub-No. 6), of the condition imposed by division 5 in its findings in the finance reports, reserving the right to impose such further limitations or restrictions as we may find necessary to impose in order to insure that the service shall be auxiliary or supplementary to train service, prevents us from exercising that right without contravening the provisions of section 212 (a)[6] of the Interstate Commerce Act. The division found that the certificates here in issue, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase; that to the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or deviation from the findings was inadvertent and, consequently, the certificates, departing as they do from the findings in the finance reports, were inadvertently issued; that under these circumstances the certificates may be revoked, and certificates in accord with such findings may be issued, without proceeding in accordance with the provisions of section 212 (a); and that no diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

In its petition, the Transportation Company renews its motion to discontinue the instant proceedings and also re-

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[6] Section 212 (a) provides in substance that certificates shall remain in effect until suspended or terminated as provided in the section. They may "upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, * * *." It further provides for a minimum of 30 days in which the holder may comply with a lawful order commanding obedience thereto.

news its objections to certain evidence adduced at the hearing. The motion to discontinue the proceedings is based on the ground that the Transportation Company made no request for the hearing; that the notice thereof did not inform it of the purpose of the hearing; that it has not had a full hearing; that no evidence has been adduced to show the need for the imposition of the conditions set forth in appendix B attached; and that it has been denied due process of law. Whether or not the Transportation Company requested the hearing is of no moment, for our power to reopen the instant proceedings is not dependent upon a request therefor by it. Some of the other contentions were discussed by the division in the prior report on page 422. We see no need to repeat them herein. Further, no arguments have been advanced by the Transportation Company which would cause us to reverse the above-mentioned rulings of the examiner and of the division. In the circumstances, they are affirmed.

The Transportation Company argues that the claimed inadvertence in the issuance of the certificates is contrary to the law and to the facts. The facts leading to the issuance of the certificates in question are relatively simple, are not disputed, were set forth in some detail in the prior report, and have been reviewed briefly herein. As heretofore stated, division 5, after formal hearings, authorized the Transportation Company to purchase the operating rights heretofore described, but in each instance, however, "the approval was made subject to a definite proviso reserving" the right to impose such limitations or restrictions as we might find necessary in order to insure that the service performed "shall be auxiliary or supplementary to the train service" of the railroad. Except with respect to the certificate issued in No. MC-89913 (Sub-No. 10), none of the certificates contain such a limitation. The Transportation Company points out, and correctly so, that in each of the proceedings included herein except in No. MC-89913 (Sub-No. 10), a so-called compliance order was issued

by division 5 in each such proceeding shortly after the authorized purchase had been consummated. Thus, so-called compliance orders were issued in March 1939, in No. MC-89913, subnumbers 1, 2, and 3, in June 1939, in No. MC-89913 (Sub-No. 5), and in July 1939, in No. MC-89913 (Sub-No. 6). These compliance orders do not contain the above-described limitation, hereafter called the limitation, which was contained in the findings in each of the finance proceedings. The Transportation Company argues in effect that the certificates issued were based on the compliance orders and therefore that they were not inadvertently issued, citing in support thereof, *Hudson Bus Transp. Co., Inc., Common Carrier Application,* 46 M. C. C. 9.

In the cited case, certain carriers petitioned for the revocation of Hudson's certificate on the ground that it inadvertently omitted a seasonal restriction and failed to specify certain streets over which the operation was to be conducted. Division 5, following the principle of the findings in *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, 42 M. C. C. 211, held that a certificate which has been issued and allowed to become final and effective without objection by interested parties, is conclusive against protestants in the absence of fraud, misrepresentation, or inadvertence on the part of the Commission, in other words, that there has to be an end to litigation. The division found that the fact "that Hudson was found entitled to a somewhat different and larger operating authority than that originally requested by its predecessors does not constitute error, for our power to grant authority in excess of that requested by them is clear." In effect, therefore, the division found, which is not the case here, that the certificate described the exact operations it had intended to authorize. There was no fraud or misrepresentation, and no inadvertence in the issuance of the certificate to Hudson. Pertinent in this connection is the following comment in respect of the correction of errors from the Supreme

Court's decision in *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424:

> We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. * * * Thus, it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss case*. * * *

Acceptance by the Court of our power to revise a certificate which was inadvertently issued is clearly implied in this language. As seen, however, it held only that our action there did not involve the mere correction of a clerical error, but represented an effort to invoke a newly conceived policy.

As pointed out by the Transportation Company, none of the compliance orders issued in No. MC-89913, subnumbers 1, 2, 3, 5, and 6, hereafter collectively called the five proceedings, contained the limitation. The limitation, however, was specifically included in the findings in each of the finance proceedings wherein the division authorized the Transportation Company to purchase certain motor-carrier rights. Thus the error, if it be an error, occurred first in the compliance orders. The certificates issued in each of the five proceedings merely followed the compliance orders and do not include the limitation.

Admittedly, in each of the finance proceedings the Transportation Company disclosed a desire, if permitted to do so, to continue all-motor service independently of the rail road, but in each proceeding it built its case primarily on the railroad's need for an auxiliary motor service, which would enable the railroad to improve its less-than-carload rail freight service, and upon the public benefits to be de-

rived from a coordinated motor-rail service. In each case, division 5 disapproved the proposed independent all-motor operations and approved the proposed acquisitions only to enable the Transportation Company to perform service auxiliary to, or supplemental of, the rail service of the railroad, as is abundantly shown by the discussion in each report. As heretofore stated, approval of the purchase in each instance was made subject to the limitation. There is now no question that approval of motor-carrier operating rights by a railroad purchaser may be conditioned on the said purchaser's "willingness to accept a narrower certificate than that possessed by the seller." See the *Rock Island* case, *supra*. In none of the finance proceedings authorizing the purchases here in issue did the Transportation Company object to the conditions upon which the purchases were approved and, as seen, it consummated the transactions shortly after the approval in each instance.

May the findings of each of the finance proceedings specifically authorizing the approval of the purchase subject to the limitation be changed so as to eliminate any condition contained in the findings, except through a formal supplemental report, report on reconsideration, or a modifying order in the specific proceeding authorizing the said purchase? We think not. It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings listed in part II of appendix A. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase.

We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212 (a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

We might properly revoke or amend the certificates, except that issued in the No. MC-89913 (Sub-No. 10), and issue new or amended certificates containing a specific recital of the reserved right to impose further limitations or restrictions to insure that future service of the Transportation Company over the routes here involved shall be limited to service which is auxiliary or supplementary to the rail service of the railroad, and then, after issuance of such new or amended certificates, consider the further question whether the reserved right should be exercised, and, if we should find that it should be exercised, thereafter issue amended certificates containing such further limitations or restrictions. Such a course, would, however, be unnecessarily cumbersome considering the fact that a full and fair hearing already has been held for the purpose of determining what, if any, limitations or restrictions should be imposed. In view of this we shall proceed now, as did the examiner and the division to the broader question as to whether we should exercise the reserved right and impose limitations or restrictions. We have usually imposed five conditions in certificates authorizing auxiliary or supplementary service, and these will now be discussed separately in the light of the evidence of record.

Condition 1.

This condition, if imposed, would in general terms limit the character of service which the Transportation Company may perform to that which is "auxiliary to, or supplemental of," the rail service of the railroad. These terms were defined in *Texas & Pacific M. Transport Co., Com. Car. Application*, 41 M. C. C. 721, and approved in the *Rock Island* case and others. Further explanation here is unnecessary. The Transportation Company vigorously opposes this condition, contending that in reliance upon its unrestricted certificates and upon certain correspondence with our Bureau of Motor Carriers relative to the filing of tariffs which indicated that its status was to be that of an ordinary motor carrier, it greatly expanded its operations in the years following its acquisitions; and that to restrict them now to a service solely auxiliary or supplementary to train service would destroy its investment, and in effect constitute the taking of its property without the process of law.

At the time of the hearing, the Transportation Company's assets had increased from $109,540 to $1,083,871, and its capital stock investment from $100,000 to $450,000. Its employees increased from 4 to 763, its trucks and tractors from 4 to 318, and its trailers from 4 to 458. Its all-motor tonnage has increased from 11,585 tons to 117,521 tons, and its joint rail-motor tonnage from 10,438 to 158,212 tons. The foregoing are, however, system figures which cover operations very much more extensive than those over the comparatively short route segments here involved. Based upon a traffic and revenue study over a 7-day period in February 1946, the Transportation Company estimates that it handles 8,868,080 pounds of traffic yearly in all-motor service over the particular route segments here involved, and that the loss thereof would represent a loss of over $73,100 in revenue. This admittedly, however, presupposes a total loss of such traffic.

We do not believe that the record justifies a conclusion that there will be a total loss of the above-described traffic. It may be that some of the tonnage will be diverted to the railroad and handled by the Transportation Company. Nor does the record justify a conclusion that imposing condition 1 in the certificates as set forth in our findings herein would destroy the Transportation Company's investment. As stated, the Transportation Company holds certificates authorizing operations over several thousand miles of routes, of which about 284 miles are involved in the instant proceedings. That the imposition of condition 1 in the certificates named in the findings herein will have some effect on the Transportation Company's investment is obvious. That the Transportation Company could not have been unaware that there was some question concerning the type of operation it could render under the rights which it was authorized to purchase in the finance proceedings listed in part II of appendix A is, we believe, also obvious. First, the findings in each of the finance proceedings in question specifically authorized the approval of the purchases subject to the limitation. Later, the type of operations conducted by the Transportation Company were the subject of a complaint in the *Campbell Sixty-Six* case heretofore discussed.

In the circumstances, the Transportation Company at the very least was put on notice that there were questions concerning the type of operations which it could perform and it cannot now successfully claim any equities because of its having made investments without first taking appropriate steps to remove the doubts which existed. Concerning the imposition of condition 1 and the other conditions generally set forth in appendix B attached, the Supreme Court in the *Rock Island* case stated:

> The Commission has continually evidenced * * * by opinon and certification its intention to have rail-

owned motor carriers serve in auxiliary and supplemental capacity to the railroads.

* * * * * * *

Such restrictions hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all or as much of motor transportation as the roads may desire. The announced transportation policy of Congress did not permit such development. [Footnote omitted.] We hold the new conditions are within the limits covered by the reservation of power to impose such further limitations as might be found necessary "to insure that the service shall be auxiliary or supplementary to the train service" of The Chicago, Rock Island and Pacific Railway Company.

We conclude that appropriate conditions should be imposed in the certificates held by the Transportation Company so as to return the operations to their proper and intended sphere, namely, a service auxiliary or supplementary to rail service. To that end, condition 1 will be added to the certificates here involved, with the exception discussed immediately below and with the exception of the certificate in No. MC-89913 (Sub-No. 2). The latter certificate, as seen, involves only an operation from Hugo to Paris, a distance of some 26 miles, and is physically isolated from the other routes. The Transportation Company's certificate in No. MC-89913 covers the operation in the reverse direction, namely, from Paris to Hugo, and authorizes service to and from all intermediate points. The certificate in No. MC-89913 contains no limitations or restrictions of any kind nor does it contain any reserved right to restrict. In the circumstances, the certificate issued in No. MC-89913 (Sub- No. 2) will not be revoked and the further discussion herein does not of course apply to such certificate.

Condition 2.

This condition would limit the authorized service to points that are stations on the rail lines of the railroad, and is calculated, together with condition 3, to implement and further the intent of condition 1. The only point on the routes embraced herein that is not a station on the rail lines in Dyess, Ark., a small community located 7 miles from the nearest station. The division found that condition 2 should be imposed on the involved operations except that neither condition 2 nor 1 should apply to operations to or from Dyess for the reasons stated in *Texas & Pac. Motor Transport Co. Ext.—Point Blue, La.*, 47 M. C. C. 425.

The Transportation Company points out that to serve Dyess as an "independent motor carrier" means that that town would necessarily appear in many motor-carrier tariffs to which it is a party and that it would entail considerable expense. The Transportation Company contends that it is impractical and uneconomical to "hold out" to perform one kind of service at a small town like Dyess and another and restricted service at other contiguous points. If the Transportation Company does not desire to continue serving Dyess, it may of course request permission to abandon and discontinue such service and for cancellation of its authority in this respect. Permission has been granted in those instances where it is shown that the public interest would not be injuriously affected by the abandonment. See *Frisco Transp. Co. Extension—Lake City, Ark.*, 42 M. C. C. 677.

Condition 3.

As stated above, this condition supplements and implements condition 1. The divsion found that a key-point restriction should be imposed. The division further found that to be effective the latter restriction necessarily requires the naming of a number of points as key points which are not located on the particular routes here in issue but which are on connecting routes; and that the naming of such

points will not operate as a limitation or diminution of the authorized operations over the latter routes, citing *Rock Island Motor Transit Co. Extension—Trenton, Mo.*, 43 M. C. C. 470. It named the key points listed in condition 3 of appendix B.

In its petition, the Transportation Company in particular objects to the naming of any key points not located on the routes here in issue. It asserts that the key points named by the division would prohibit it from transporting freight at motor rates and on motor billing (1) between St. Louis or Kansas City and Oklahoma City or Dallas by utilizing the routes authorized in Nos. MC-89913 (Sub-No. 1) and MC-89913 (Sub-No. 3), and (2) between Kansas City or Springfield and Memphis by utilizing the routes authorized in Nos. MC-89913 (Sub-No. 5) and MC-89913 (Sub-No. 6). It argues that its right to serve between St. Louis or Kansas City and Oklahoma City or Dallas or between Kansas City or Springfield and Memphis, did not arise under any of the certificates here in issue, but that such right was authorized in *Frisco Transp. Co.—Purchase—Reddish*, 35 M. C. C. 132, *Frisco Transp. Co.—Purchase—Ozark Truck Lines, Inc.*, 35 M. C. C. 255, and others, wherein its was authorized to purchase certain operating rights which were "authorized to be unified with rights otherwise confirmed in applicant [the Transportation Company]."

The above argument is without merit. The Joplin-Miami route is one of the routes embraced in the instant proceedings and constitutes, for example, a connecting segment between the Transportation Company's routes east of Joplin into Springfield, Kansas City, St. Louis, and Memphis, and those west of Miami into Oklahoma City and Dallas. In other words, the Joplin-Miami route must be used to enable the Transportation Company to perform an all-motor service over the extremely long routes between St. Louis, Memphis, and Kansas City, on the one hand, and Dallas and Oklahoma City on the other. For the reasons

heretofore discussed, we concluded that the certificate, No. MC-89913 (Sub-No. 1), covering the Joplin-Miami route, was inadvertently issued, in that it did not contain a specific recital of the reserved right to impose further limitations or restrictions to insure that future service of the Transportation Company over this route shall be limited to service which is auxiliary or supplementary to the rail service of the railroad. The naming of key points is necessary to insure that the future service over the routes shown in the findings herein will be truly auxiliary or supplementary to rail service. The key points named herein will not affect any of the Transportation Company's operations "that do not involve also a movement over the routes which are the subject of the instant proceedings."

For the reasons discussed at some length by the division in its report beginning at page 431, it concluded that the key points listed in appendix B attached should be named. With the exception noted above, neither the Transportation Company nor any other party has raised any specific questions concerning the key points named by the division. In the circumstances, we conclude that the findings of the division respecting the named key points should be affirmed.

Conditions 4 and 5.

Condition 4 provides that all contractual arrangements between the Transportation Company and the railroad shall be reported to us and be subject to revision as found necessary in order that the arrangements shall be fair and equitable to the parties. In matters relating to compensation between the two companies, the railroad will in reality be dealing with itself and, so far as ultimate financial results to it are concerned, it is immaterial what these arrangements may be. It is important, however, that they be properly adjusted if this Commission and the general public are to know or have the means of ascertaining the cost to the railroad of the services performed by the

Transportation Company. Such information might be important in a rate proceeding or otherwise. See *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M. C. C. 221. Accordingly, this condition should be imposed.

Condition 5, which will also be imposed, reserves to us the right in the future to make such further changes or modifications in the conditions as may be necessary in order to make certain that the motor service remains auxiliary or supplementary to the rail service.

Findings.

Upon oral argument:

We find that the certificates issued to the Frisco Transportation Company in the proceedings listed in part I of appendix A hereto, except No. MC-89913 (Sub-No. 10), were inadvertently issued; that such certificates, except No. MC-89913 (Sub-No. 2), should be canceled and at the same time new or amended certificates should be issued in conformity with the findings in the proceedings listed in part II of appendix A, except No. MC-F-619, and which require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B attached; and that the certificate issued in No. MC-89913 (Sub-No. 10) should be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B attached.

We further find that the certificate issued to the Frisco Transportation Company in No. MC-89913 (Sub-No. 2) requires no modification.

An appropriate order will be entered.

Mitchell, *Commissioner*, dissenting:

In *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, the Supreme Court was called upon to determine

whether or not the Commission had the power to further restrict a certificate where it had specifically reserved the right in that instrument and whether or not it could insert into a vendee's certificate a restriction not contained in vendor's certificate. Although those issues are different from those involved herein, the following language of the Court is appropriate to this proceeding:

> But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental to rail service *does not necessarily imply power to change the conditions* designed to bring about the desired coordination, *after issuance of the certificate.* The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate. (Pages 433-434.) [Italics supplied.]
>
> When competition, public interest in the preservation of the inherent advantages of rails and motors, and use of motor service by railroads in their operations are the basis, as they are * * * for allowing acquisitions of motor routes by railroads, we think it consonant with that policy to reserve the right to make further limitations, restrictions or modifications to insure that the service remain auxiliary or supplemental. Congress could not have expected the Commission to be able to determine once and for all the provisions essential to maintain the required balance. *Such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will.* That would violate section 212, allowing suspension, change or revocation only for the certificate holders' willful failure to comply with the Act or lawful orders or regulations of the Commission. (Pages 434-435.) [Italics supplied.]
>
> * * * We will solve the problem by determining that the order approving the purchase has not the finality

> of a certificate but is rather only a tentative approach to the consummation of the purchase subject to changes in conditions and requirements. * * * This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. (Pages 445-446.)

The report of the majority bases our right to change the certificates involved herein on a finding that they were issued through inadvertence. It is interesting to note, according to the majority, that we inadvertently issued five separate and distinct certificates in five different proceedings which, although they involved the same carrier, were handled individually. If that be true, as the majority find, then some Bureau of this Commission was pretty careless in the manner in which it was handled. The record, in my opinion, does not justify the findings of the majority and, therefore, I respectfully dissent.

Alldredge, *Commissioner*, dissenting in part:

I agree with the conclusions of the majority in the Sub-No. 2 and Sub-No. 10 proceedings. In each of the remaining proceedings, division 5 entered orders approving the purchase by the Frisco Transportation Company of certain operating rights subject to the terms and conditions set out in the findings in the respective reports. In the findings of each of the reports is a *reservation* to the effect that the authority granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary to, or supplementary of, the train service of the parent railway company. Thereafter, in subnumbers 1, 3, 5, and 6, of docket No. MC-89913 (respectively assigned to embrace the rights purchased in MC-F-618,

MC-F-578, MC-F-678, and MC-F-679) division 5 entered orders directing that the Frisco Transportation Company be issued certificates upon compliance with certain conditions. Each of the last-mentioned orders was introduced by the phrase: "This proceeding coming on for further consideration." These orders specified the authority to be issued, but did not contain the reservation mentioned above; nor was the reservation placed in the certificates which were thereafter issued. A question is raised as to the power of the Commission now to put the above reservation in the certificates.

In *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, the Supreme Court, in connection with the power of the Commission to tighten the restrictions in a certificate of a railroad's motor-carrier affiliate, stated at page 445:

> This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected.

The majority has now undertaken such a procedure on the ground that the reservation was inadvertently omitted from the certificates. Such a position, it seems to me, is tenuous. Compare *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424. This does not mean, however, that I am of the opinion that nothing can or should be done. Section 208 (a) of the Interstate Commerce Act expressly provides that there shall, at the time of issuance and *from time to time thereafter*, be attached to the exercise of the privileges granted by the certificate such reasonable terms, con-

ditions, and limitations as the public convenience and necessity may require.

I would proceed under section 208 (a) of the act to attach to the certificates the conditions which the majority has found to be proper.

Commissioners Mahaffie and Knudson dissent.

Commissioner Tuggle did not participate in the disposition of these proceedings.

Appendix A.

Proceedings Covered by Report.

Part I.

No. MC-89913 (Sub-No. 1), Frisco Transportation Company Extension—Joplin-Miami.

No. MC-89913 (Sub-No. 2), Frisco Transportation Company Extension—Hugo-Paris.

No. MC-89913 (Sub-No. 3), Frisco Transportation Company Extension—Joplin-Carthage.

No. MC-89913 (Sub-No. 5), Frisco Transportation Company Extension—Memphis-Blytheville.

No. MC-89913 (Sub-No. 6), Frisco Transportation Company Extension—Memphis-Walnut Ridge.

No. MC-89913 (Sub-No. 10), Frisco Transportation Company Extension—Blytheville-Lake City.

Part II.

No. MC-F-578, Frisco Transportation Company—Purchase—Joseph D. Cooper. Prior Report: 15 M. C. C. 317.

No. MC-F-618, Frisco Transportation Company—Purchase—John Hamm. Prior Report: 15 M. C. C. 320.

No. MC-F-619, Frisco Transportation Company—Purchase—J. A. Rose. Prior Report: 15 M. C. C. 323.

No. MC-F-678, Frisco Transportation Company—Purchase—Joseph W. Parker. Prior Report: 25 M. C. C. 96.

No. MC-F-679, Frisco Transportation Company—Purchase—Louis Tolson. Prior Report: 25 M. C. C. 96.

Appendix B.

Limitations or restrictions which division 5 found in its report on further hearing 53 M. C. C. 415, should be imposed in certificates issued in proceedings listed in part I of appendix A.

1. The service to be performed by the Frisco Transportation Company, hereafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amory-Tupelo (considered as one), Miss.

4. All contractual arrangements between the Transportation Company and the railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to in-

sure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of December, A. D. 1953.

No. MC-89913 (Sub-No. 1)

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)

FRISCO TRANSPORTATION COMPANY EXTENSION—HUGO TO PARIS

No. MC-89913 (Sub-No. 3)

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)

FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)

FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)

FRISCO TRANSPORTATION COMPANY EXTENSION—BLYTHEVILLE-LAKE CITY

No. MC-F-578

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH D. COOPER

No. MC-F-618

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOHN HAMM

No. MC-F-619

FRISCO TRANSPORTATION COMPANY—PURCHASE—J. A. ROSE

No. MC-F-678

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH W. PARKER

No. MC-F-679

FRISCO TRANSPORTATION COMPANY—PURCHASE—LOUIS TOLSON

It appearing, That on October 22, 1951, the Commission, division 5, entered its report, 53 M. C. C. 415, and order in the above-entitled proceedings, ordering that certain certificates of public convenience and necessity held by Frisco Transportation Company should be revoked because they were inadvertently issued, and that new or amended certificates should be issued in order to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to, or supplemental of, rail service;

It further appearing, That by order entered July 7, 1952, upon consideration of the records in the above-entitled proceedings, of petition filed by Frisco Transportation Company, and of the replies filed by certain parties thereto, the said proceedings were reopened for oral argument;

And it further appearing, That full investigation of the matters and things involved in these proceedings has been made; and that the Commission, on the date hereof, has made and filed a report on oral argument herein containing its findings of fact and conclusions thereon, which re-

port and the aforesaid report and order of October 22, 1951, are hereby referred to and made a part hereof;

It is ordered, That the order of October 22, 1951, be, and it is hereby, vacated and set aside.

It is further ordered, That the certificates heretofore issued to the Frisco Transportation Company in No. MC-89913 (Sub-Nos. 1, 3, 5, and 6) be, and they are hereby, cancelled; and that new or amended certificates be issued in lieu of those cancelled in conformity with the findings in Nos. MC-F-578, MC-F-618, MC-F-678, and MC-F-679, and that all future operations conducted thereunder shall be subject to the limitations or restrictions set forth in appendix B attached to the said report on oral argument.

And it is further ordered, That the certificate heretofore issued to the Frisco Transportation Company in No. MC-89913 (Sub-No. 10) be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as set forth in appendix B attached to the said report on oral argument.

By the Commission:

GEORGE W. LAIRD,
Secretary.

(SEAL)

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of April, A. D. 1955.

No. MC-89913 (Sub-No. 1)

FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)

FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC-89913 (Sub-No. 3)

FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)

FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)

FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)

FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578

FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618

FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619

FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678

FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679

FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

Upon consideration of the records in the above-entitled proceedings, and of;

(1) Petition of applicant, dated February 2, 1954, for reconsideration of the Commission's report on oral argument of December 7, 1953;

(2) Joint reply of American Trucking Associations, Inc., and the Regular Common Carrier Conference, interveners in opposition, filed February 15, 1955;

(3) Joint reply of Be-Mac Transport Co., Inc., Consolidated Forwarding Co., Inc., Viking Freight Company, C. E. S. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., and Southern-Plaza Express Company, Inc., interveners in opposition, dated February 11, 1955;

(4) Reply of Campbell Sixty-Six Express, Inc., intervener in opposition, dated February 11, 1955;

(5) Petition of Southern-Plaza Express Co., Inc., for leave to intervene and for leave to adopt the reply filed by Be-Mac Transport Co., Inc., referred to in (3) above;

and good cause appearing therefor:

It is ordered, That said petitioner, Southern-Plaza Express Co., Inc., be, and it is hereby, permitted to intervene in said proceedings with the right to appear and participate in all further proceedings herein;

It is further ordered, that Southern-Plaza Express Co., Inc., be, and it is hereby, permitted to adopt the reply of Be-Mac Transport Co., Inc., et al.;

It is further ordered, That said petition for reconsideration be, and it is hereby, denied, for the reason that the petition raises no issue of law or fact requiring a change in the findings in the report or oral argument, decided December 7, 1953.

By the Commission:

HAROLD D. McCOY,
Secretary.

(SEAL)